IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 146

(OCTOBER TERM, 1924, No. 556)

ARMIN A. SCHLESINGER, HENRY J. SCHLESINGER, AND MYRON T. MACCLAREN, EXECUTORS OF THE LAST WILL AND TESTAMENT OF FERDINAND SCHLESINGER, DECEASED, *Plaintiffs in Error,*

v.

THE STATE OF WISCONSIN AND COUNTY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION OF STATE OF WISCONSIN AND COUNTY OF MILWAUKEE FOR REHEARING.

HERMAN L. EKERN,
Attorney General,
FRANKLIN E. BUMP,
Assistant Attorney General,
of the State of Wisconsin,
Counsel for Defendants-in-Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The State of Wisconsin and county of Milwaukee, defendants in error, by Herman L. Ekern, Attorney General, and Franklin E. Bump, Assistant Attorney General, their counsel, respectfully move for the rehearing

in this cause, which was decided on March 1, 1926, on the following grounds:

1. THREE DAYS BEFORE THE JUDGMENT WAS ENTERED CONGRESS PASSED AND THE PRESIDENT APPROVED A LAW SIMILAR TO THE WISCONSIN STATUTE DECLARED VOID.

2. IF THE DECISION SHALL STAND, THE UNITED STATES REVENUE ACT OF 1926 MUST FALL, IN PART OR IN WHOLE.

3. SHOULD NOT THE UNITED STATES GOVERNMENT HAVE THE OPPORTUNITY TO BE HEARD BEFORE DECISION BECOMES FINAL?

4. SHOULD NOT THE STATES OTHER THAN WISCONSIN HAVING SIMILAR LAWS BE ACCORDED A LIKE PRIVILEGE?

5. IF ANY MODIFICATION OF THE PRINCIPLE ANNOUNCED IN THIS DECISION IS TO BE MADE, SHOULD IT NOT BE MADE NOW SO THAT THE PRESENT CASE MAY BE DECIDED ACCORDINGLY.

More particularly, it is respectfully suggested:

That the decision is in error in holding (a) that the Legislature may not in the exercise of judgment and discretion as a proper classification provide that gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are conclusively presumed to have been so made without regard to actualities while like gifts at other times are not thus treated, and (b) that all gifts or, indeed, any gift with-

out testamentary character may not be subjected to graduated taxes.

That the decision imperils the validity not only of paragraphs (c) and (d) of sec. 302, which creates a conclusive presumption (similar to the Wisconsin Statute held void in this case) as a part of the estate tax provisions of the new revenue act of the United States passed by Congress and approved by the President on February 26, 1926, but also of the repeal of the gift tax feature of the old revenue act of 1924 (sec. 319), and perhaps of the entire amendment of the estate tax provisions, if the enactment of sec. 302 for the effective enforcement of the estate tax was a substantial inducement for the repeal of the gift tax and the reduction of the taxes imposed by the 1924 act.

This motion assumes that the attention of the court had not been called to said sec. 302 at the time this cause was decided (the case having been argued and submitted on January 18, 1926), and the suggestion is most respectfully made by this motion that if the principle of constitutional law laid down by the majority of the court in this case is to stand, it should be allowed to become final only after reargument and an opportunity afforded to the United States Government, as well as to the other States of the Union having similar provisions to the Wisconsin law involved, to be heard, *amici curiae*, because of the far-reaching effect the ultimate decision will have upon both Federal and State taxation policies.

A motion for rehearing has been granted on the ground that the decision would determine the rights of numerous parties situated as the appellee in whose behalf no argument was made. *Green v. Biddle*, 8 Wheat. 1, 17, 5 L. Ed. 547, 552.

In the case cited the motion was even permitted to be made by an *amicus curiae*. *Green v. Biddle*, 8 Wheat. 1, 17, 5 L. Ed. 547, 552.

The text of the provisions of the Revenue Act of 1926, as well as of the similar provisions of the State statutes of Arizona, Arkansas, Colorado, Kansas, Kentucky, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, Tennessee and West Virginia is printed as Appendix A hereto. The substance of the gift tax provisions of the Revenue Act of 1924 is printed as Appendix B hereto.

We trust that it may not be improper to add to the statement of the grounds of the motion some comment to indicate the importance to the Federal Government of the question involved in the case as a reason why it should be reopened and any other accorded the opportunity to be heard.

The gift tax of the revenue act of 1924, which is superseded by the conclusive presumption of the 1926 act, was not a distinct tax. It was merely corrolary to the estate tax imposed by part I, Title III, the gift tax being imposed by part II of the same title, and was regarded by Congress as being essential to preserve the efficacy of the estate tax, the rate imposed and the exemptions granted being in substance the same. It is apparent from the Congressional debates that while it was imposed for revenue purposes, its substantial object was to prevent evasion of the estate tax and the high surtaxes of the income tax law resulting from the fact that persons of large wealth divided and administered their estates by direct gifts or by creation of trusts while still living. It apparently was well understood that although some direct revenue

would be obtained from the gift tax, the chief purpose to be accomplished was substantial increase in revenue from the estate tax. See 65 Congressional Record 3119, *et seq.*; 3170, *et seq.*, and 8094, *et seq.* Revenues of the Government from the estate and income taxes have been seriously impaired, and the rebuttable presumption that gifts made within two years prior to death were made in contemplation thereof under sec. 301 (c) of the estate tax law was largely ineffective for want of evidence available to the revenue officials.

The constitutionality of the gift tax was upheld by the United States District Court for the Western District of Michigan, Southern Division, in the case of *Blodgett v. Holden*, decided February 17, 1926, and the substance of the foregoing statement appears in the opinion of Judge Raymond.

A contrary decision was made by Judge Hand of the United States District Court, Southern District of New York on February 15, 1926.

Both decisions are reported in the Prentice-Hall, Inc., Service under Federal Inheritance, 12,752 A-N.

The conclusive presumption that gifts made within a fixed period of the death of the donor shall be deemed to be made in contemplation of death within the meaning of the inheritance tax laws of Wisconsin and the other States referred to, was intended to accomplish the same purpose and was enacted for the same reason that the gift tax was passed by Congress. The fact that Congress has now abandoned the gift tax and adopted the conclusive presumption feature of the state inheritance tax laws in lieu thereof for the efficient enforcement of Federal estate tax provisions of the revenue act, and that, as we understand it, any such clas-

sification is now held invalid, we believe, makes a rehearing proper and necessary in this case.

Respectfully submitted,

HERMAN L. EKERN,
Attorney General,

FRANKLIN E. BUMP,
Assistant Attorney General,
of the State of Wisconsin,
Counsel for Defendants in Error.

United States of America, State of Wisconsin, County of Dane, ss.:

Herman L. Ekern, Attorney General, and Franklin E. Bump, Assistant Attorney General, of the State of Wisconsin, counsel for the defendants in error in the above-entitled cause, each for himself, does hereby certify that the above and foregoing motion for a rehearing is presented in good faith, and not for delay.

HERMAN L. EKERN,
Attorney General,

FRANKLIN E. BUMP,
Assistant Attorney General,
of the State of Wisconsin,
Counsel for Defendants-in-Error.

APPENDIX A

Text of pertinent provisions of the United States Revenue Act of 1926, approved February 26, 1926.

Also, for comparison, the provisions of the Revenue Act of 1924.

Also excerpts from the provisions of the inheritance tax laws of Arizona, Arkansas, Colorado, Kansas, Kentucky, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, Tennessee and West Virginia.

UNITED STATES

Revenue Act of 1926.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers* SHALL BE DEEMED AND HELD TO HAVE BEEN MADE IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF THIS TITLE. Any transfer of a material part of his property in the nature of a final disposition or dis-

tribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments* SHALL BE DEEMED AND HELD TO HAVE BEEN MADE IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF THIS TITLE; * * *."

UNITED STATES.

REVENUE ACT OF 1924.

The Revenue Act of 1924, Public—No. 176—68th Congress, approved June 2, 1924, contained the following provisions under Sec. 302:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with

respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, UNLESS SHOWN TO THE CONTRARY, *be deemed to have been made in contemplation of death within the meaning of Part I of this title;*

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth; * * *."

Paragraphs (c) and (d) as contained in the Revenue Act of 1926 are not to be found in any prior act.

(The italics and capitals are ours.)

TEXT OF SIMILAR PROVISIONS OF STATE STATUTES

ARIZONA

[Laws of 1922, Chs. 26 and 26A. Sec. 1 (3).]

"* * * Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable

consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

ARKANSAS

[Stats. of 1923, Sec. 10218 (3).]

"Every transfer by deed, grant, bargain, sale or gift made within three years prior to the death of the grantor, vendor, or donor, of the value of five hundred dollars ($500), or in excess thereof, at the time of such transfer in the nature of final disposition or distribution of the estate and without adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this chapter."

COLORADO

[Laws of 1921, Ch. 144, Sec. 2, Par. C.]

"* * * * any such gift, or any such deed, grant, bargain, sale, assignment or contract without valuable and adequate consideration (i. e., a consideration equal in money or moneys worth to the full value of the property transferred) made within one year prior to the death of the decedent shall be deemed and held to have been made in contemplation of the death of the decedent."

KANSAS

[Stats. of 1923, Ch. 79, Sec. 79-1501, Par. 3.]

"* * * Property shall be deemed to have been transferred by grant or gift in contemplation of death under this act when such grant or gift shall have been executed within ninety days prior to the death of the grantor or donor."

KENTUCKY

[Laws of 1924, Ch. 111, Sec. 1, Par. 2.]

"Every transfer made within three years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section. And in the event a transfer was made more than three years prior to the death of the decedent, it shall be a question of fact to be determined by the proper tribunal whether such transfer was made in contemplation of death."

MISSISSIPPI

[Laws of 1924, Ch. 134, Sec. 5 (1) (f).]

"* * * any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by a decedent within two years of his death without such consideration, shall be deemed to have been made in contemplation of death within the meaning of this act."

MISSOURI

[Stats. of 1919 as amended in 1921 and 1923. Sec. 558.]

"* * * Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. * * *"

NORTH CAROLINA

[Inheritance Tax Act of 1925, Sec. 6, Par. Sixth.]

"All advancements and gifts equal to or in excess of three per cent of the decedent's estate at the time such advancements or gifts were made, and made within three years of the decedent's death, shall be subject to the inheritance tax herein prescribed as of the date of the death of the decedent. Any transfers or conveyances made upon consideration that was grossly inadequate within the same period shall be an inheritance to the extent that the consideration was inadequate at the time it was made, and shall be subject to the inheritance tax herein prescribed as of the date of the death of the decedent."

NORTH DAKOTA

[Laws of 1919, Ch. 225, Sec. 1, Par. (3).]

"* * * Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

SOUTH CAROLINA

[Laws of 1922, p. 800, Sec. 1, Par. c.]

"* * * Transfers of property by gift or deed, between parties related by blood or marriage, made and completed within five years prior to death, and without an adequate, valuable consideration, shall be considered made in contemplation of death."

TENNESSEE

[Laws of 1919, Ch. 46, Sec. 1, Par. (4).]

"* * * and every such transfer made within two (2) years next preceding the date of such death without consideration equal in money or money's worth to the full value of the property transferred, shall be construed to have been made in contemplation of death within the meaning of this Act; * * *"

WEST VIRGINIA

[Laws of 1904, Ch. 6, Sec. 1, Par. (c), as amended by Laws of 1921, Extraordinary Session, Ch. 3.]

"* * * Every transfer by deed, grant, bargain, sale or gift, made within three years prior to the death of the grantor, bargainor, vendor, or donor, of value of five hundred dollars, or in excess thereof, at the time of such transfer in the nature of final disposition, or distribution of an estate, and without adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this chapter. * * *"

APPENDIX B

Substance of the Gift Tax Provisions of the Revenue Act of 1924.

Section 319 provides that for the calendar year 1924 and each calendar year thereafter, a tax based upon a certain graduated scale therein set forth is imposed upon the transfer by gift of any property wherever situated, whether made directly or indirectly. The table of percentages provides for various rates, beginning at 1 per cent on an amount of taxable gifts not in excess of $50,000.00, 2 per cent of the amount by which the taxable gifts exceed $50,000.00, and do not exceed

$100,000.00, and so on, the rates gradually increasing to a maximum of 40 per cent on the amount of taxable gifts in excess of ten million dollars.

Section 320 provides in substance that if the gift is made in property, the fair market value shall be considered the amount of the gift, and where property is sold or exchanged for less than a fair consideration the difference between the actual consideration and fair market value shall be deemd a gift.

Section 321 provides in substance for the following exemptions:

1. Gifts aggregating in value $50,000.00 in any calendar year;

2. Gifts for public purposes or to corporations organized exclusively for religious, charitable, scientific, literary, educational or similar purposes;

3. Gifts to any one person aggregating $500.00 in any calendar year;

4. Property transfer by gift identified as having been received by the donor within five years prior to the gift and upon which a gift tax has been paid.

Section 322 contains appropriate provisions to prevent the duplication of the estate tax and gift tax upon the same property.

Sections 323 and 324 provide for filing of returns and the payment of the tax assessed thereon.